

# Justification, Legitimacy, and Administrative Governance\*

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## Abstract

Richard Stewart, in his classic article ‘The Reformation of American Administrative Law,’ argues that the demise of the ‘transmission belt’ model of administrative governance creates a crisis of agency legitimacy, and he skeptically surveys a range of possible solutions to the legitimacy crisis. I claim that Stewart’s skepticism is misguided. It may be true that no feasible administrative structure is democratically legitimate; but it is also true, given the logic of moral justification, that in every choice situation confronted by agency decisionmakers, or by those who design agencies, there is some morally permissible and justified choice (perhaps a choice that sacrifices democratic legitimacy for the sake of other values).

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\*Many thanks to Abby Wright for research assistance.

*The Reformation of American Administrative Law* (“*Reformation*”) is a wonderful article.<sup>1</sup> It is awesomely broad, dense and deep: broad in its coverage of administrative law questions, dense in its doctrinal detail, deep in the non-legal literatures it brings to bear (philosophy, political science, economics) and, even more, in its subtle and elegantly structured examination of the normative strengths and weaknesses of different models of administrative law. It set the terms for a generation, at least, of subsequent administrative law scholarship, just as its older sibling, Bickel’s *The Least Dangerous Branch*,<sup>2</sup> did in constitutional law. Indeed, Bickel and Stewart attack the same general question:<sup>3</sup> How to legitimate non-legislative governance? Bickel’s variant of that general question: How to overcome the “countermajoritarian difficulty” intrinsic to judicial review? Stewart’s variant: How to legitimate *administrative* governance, given agency discretion and therewith the demise of the traditional (“transmission belt”) model of agency legitimacy? And Stewart, struggling with his particular instantiation of the problem of undemocratic governmental power, penned an opus so good in the ways I’ve just described that (as with Bickel’s opus) any of us would be happy to have written something fractionally as good or fractionally as influential.

Against this backdrop of admiration, I will now paint a darker scene. Who wants to read a laudatory *Festschrift*? So let me jump straight to the criticism: Stewart’s skeptical answer to his question, How to legitimate administrative governance?, is misguided. Remember the structure of *Reformation*. In Part I, Stewart outlines the traditional model and the problem that discretion poses for it. Part II discusses, and rejects, four possible solutions: abolishing agencies, reviving the non-delegation doctrine, requiring agencies to govern through rules, and imposing a substantive standard of allocational efficiency. Stewart’s verdict: “Each of the four alternatives offers some promise . . . [b]ut none approaches a complete solution, and they are in considerable degree mutually inconsistent.”<sup>4</sup> Part III describes, and Part IV criticizes, the interest-representation model animating then-recent judicial innovations in administrative law doctrines, in the areas of procedural due process, standing, and intervention in agency proceedings. Part IV concludes with a trenchant summary of Stewart’s grounds for skepticism that these sorts of innovations can erase agencies’ legitimacy gap:

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<sup>1</sup> Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667 (1975).

<sup>2</sup> ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1962).

<sup>3</sup> Lisa Bressman gets credit for this insight. See Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 464-65 (2003).

<sup>4</sup> *Reformation* at 1688.

The foregoing discussion raises serious questions about the transformation of administrative law into a system for assuring the representation of all affected interests in agency proceedings. Such a system involves major difficulties of implementation, is likely to be quite costly, and may lead to the employment of inferior decisional processes. Moreover, the expansion of participation rights to promote interest representation will accentuate the polycentric and unique qualities of each proceeding, rendering it more difficult for agencies or courts to establish rules of decision to govern large numbers of cases. . . .

At the same time, agency solicitude for the interests of regulated or client firms is likely to persist.<sup>5</sup>

Part V is even more dismissive of the utility of “political modes” of interest representation: popular election of agency officials and selection of agency officials by interest groups. In short, Stewart tells us after ninety pages of struggle: “A system of interest representation, whether judicial or political, is not an acceptable general solution to the problem of delegated legislative power exercised by administrative agencies.”<sup>6</sup> There is as yet no general solution to the problem of agency legitimacy.

The analysis of this Article demonstrates that the delegation of broad authority to agencies has gravely undermined the ability of the traditional model to control governmental power, but that no general solution – either in terms of procedural mechanisms or authoritative rules of decision – for the resulting problem of administrative discretion has yet emerged.<sup>7</sup>

The final portion of the article toys, inconclusively, with the possibility that agency action might be legitimated piecemeal (this is what Stewart calls “the Nominalist Thesis” – different legitimating models for different agencies), or that the present lack of a general model is a temporary phenomenon (the “Transitional Thesis”).

I want to challenge Stewart’s skepticism, not by taking issue with his analyses of the six models he considers (abolition, non-delegation, rules, efficiency, and judicial and political interest representation), or by proposing others (Presidential governance,<sup>8</sup> regulatory negotiation,<sup>9</sup> or civic republican administration<sup>10</sup>), but on conceptual grounds. The concepts, here, are moral

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<sup>5</sup> *Id.* at 1789.

<sup>6</sup> *Id.* at 1802.

<sup>7</sup> *Id.* at 1805.

<sup>8</sup> See, e.g., Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2331 (2001).

<sup>9</sup> See, e.g., Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1 (1997).

<sup>10</sup> See, e.g., Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511 (1992).

legitimacy and moral justification, and the argument is pretty simple. Consider some choice involving administrative agencies: for example, the choice by an agency to issue a particular rule or order, as opposed to other possible rules or orders, or the choice by legislators or the President to structure an agency's legal power, procedures and so on in one or another particular way. The actor's choice, let us assume, is morally illegitimate. Either this defeats the all-things-considered moral justifiability of the choice, or it doesn't. In the first case, some other choice will be all-things-considered morally justified. In the second case, the choice will be illegitimate but, still, all-things-considered morally justified. In either event there will be *some* choice that the actor is justified in taking. For instance, assume that the open-ended cast of the FCC's organic statute and the domination of FCC processes by organized groups at the expense of diffuse groups mean that some FCC rule, which advances the interests of the organized groups, is democratically illegitimate. One possibility: the FCC is still all-things-considered justified in enacting the rule (say, because the net substantive benefits of the rule outweigh its costs to democratic values). Another possibility: because the rule is illegitimate, the FCC ought not enact it and would instead be justified in refraining from regulation. In either event, there is some course of action that the FCC ought to take – some solution to its legitimacy problem. Ditto if we think of a choice involving the design of the FCC. Congress' decision to empower the agency to regulate the airwaves under the "public convenience, interest or necessity"<sup>11</sup> standard (if illegitimate) might still be the right thing for Congress to do – given the difficulty of drawing a narrow standard and the costs of deregulation – or it might be the wrong thing, as compared to deregulation or a narrower standard. But there will inevitably be a solution to Congress' moral problem.

I've gotten ahead of myself. Let me say a little more about the aims and content of *Reformation*, by way of justifying my moralized interpretation of the problem that Stewart sets himself to solve and that, I think, is necessarily soluble. That problem, as I've already said, is the problem of legitimacy created by agency discretion. I think it is clear beyond cavil that *Reformation* is centrally concerned with *legitimacy*. The word and its cognates ("legitimate," "legitimation") recur throughout the work.<sup>12</sup> The traditional model, Stewart tells us in concluding the Introduction, "bespeak[s] a common social value in legitimating, through controlling rules and procedures, the exercise of power over private interests by officials not otherwise accountable."<sup>13</sup> At the end of Part I, after describing the dissolution of the traditional model, Stewart sets the stage for the rest of the article by stating: "The ultimate problem is to control and validate the exercise of

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<sup>11</sup> See 47 U.S.C. §303 (2000).

<sup>12</sup> I count more than twenty occurrences.

<sup>13</sup> *Reformation* at 1671.

essentially legislative powers by administrative agencies that do not enjoy the formal legitimization of one-person one-vote election.”<sup>14</sup> Still, one might wonder whether this “ultimate problem” of legitimacy that *Reformation* engages is a moral one. Mightn’t it be some other kind of legitimacy problem?

Richard Fallon, in a recent paper about judicial review, distinguishes between legal legitimacy, sociological legitimacy and moral legitimacy.<sup>15</sup> As Fallon stresses, these three kinds of legitimacy interpenetrate in various ways,<sup>16</sup> but they remain distinct. There certainly are legal scholars, in particular proponents of a reinvigorated non-delegation doctrine, who worry about the legal legitimacy of discretionary agency power. Consider Stewart’s statement that “[v]ague, general, or ambiguous statutes create discretion and threaten the legitimacy of agency action.”<sup>17</sup> This could be understood as a claim that vague, general or ambiguous statutes threaten the *legality* of agency action, most obviously under Article I, Section 1 of the Constitution. But this isn’t what I take Stewart to be claiming. He opposes a tougher non-delegation doctrine<sup>18</sup> – and although this opposition is, I suppose, consistent with the view that Article I, Section I sets forth a judicially unenforceable constitutional norm, one whose violation legally delegitimizes agency action but ought not be rectified by courts, *Reformation* is just not pitched as a treatment of constitutional law.<sup>19</sup> In short, Stewart’s concern is *not* legal legitimacy.

As for sociological legitimacy: this concerns, roughly, whether some group of individuals (perhaps participants in agency processes, perhaps citizens generally, or perhaps some other group) accepts the government, or some part of it, as legitimate.<sup>20</sup> Do they trust the governmental body? Do they support it? Do they credit its claims to be justified in exercising coercive power and to possess authority? There is a rich empirical literature on the sociological legitimacy of

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<sup>14</sup> *Id.* at 1688.

<sup>15</sup> See Richard H. Fallon, Jr., *Legitimacy and the Constitution* (Sept. 25, 2004) (unpublished paper, on file with author).

<sup>16</sup> For example, if the Bill of Rights incorporates certain moral values, then a statute might be legally illegitimate in virtue of its moral illegitimacy. And H.L.A. Hart’s doctrine of the “rule of recognition” draws a link between law and a certain kind of sociological legitimacy: although particular laws need not be sociologically legitimate, those laws are valid because derivable from a foundational rule, the rule of recognition, which is a social norm accepted by legal officials. See Matthew D. Adler, *Popular Constitutionalism and the Rule of Recognition: Whose Practices Ground U.S. Law?* (October 2004) (unpublished paper, available on SSRN).

<sup>17</sup> *Reformation* at 1676.

<sup>18</sup> See *id.* at 1693-97.

<sup>19</sup> Note that Stewart does not recommend that legislators strive to maintain a high degree of specificity across the board. See *id.* at 1695-96.

<sup>20</sup> See Fallon, *supra* note 15; David Beetham, *Legitimacy*, in *ROUTLEDGE ENCYCLOPEDIA OF PHILOSOPHY* 538 (Edward Craig ed., 1998).

certain governmental entities, such as police forces, courts and Congress.<sup>21</sup> Some of this literature reaches conclusions that mimic plausible moral conclusions. For example, just as a procedurally unfair governmental decision, one where the decisionmaker is biased or incompetent or where no voice is given to important interests, may be morally illegitimate, so too it may be sociologically illegitimate. Tom Tyler's impressive work shows that ordinary citizens tend to obey the criminal law if they view the law and legal authorities as legitimate, which in turn depends in part on whether they see their individual encounters with the police and the court system as procedurally fair.<sup>22</sup> But whether these findings carry over to other governmental bodies and contexts is far from clear.<sup>23</sup> The sociological legitimacy of a federal administrative agency's regulations, for citizens (say), may depend less on the inclusiveness of the rulemaking process, the open-endedness of the agency's statute, or even the substantive quality of the rules (their efficiency or distributive fairness), than on the citizens' general support for the agency. Indeed, citizens may infer that the rules are procedurally fair or substantively high quality from the premise that the agency is generally trustworthy.<sup>24</sup>

In short, the features of agency decisionmaking that so engage Stewart and that have troubled administrative law scholars since – delegated power, the skewed representation of interests, the costliness and torpor of agency processes, the allocative inefficiency of agency outcomes – may not be the crucial determinants of agencies' sociological legitimacy.<sup>25</sup> More to the point, what

<sup>21</sup> For overviews, see Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME AND JUSTICE: A REVIEW OF RESEARCH 283 (Michael Tonry ed., 2003); Stacy G. Ulbig, *Policies, Procedures, and People: Sources of Support for Government?*, 83 SOC. SCI. Q. 789, 790-96 (2002); and WHY PEOPLE DON'T TRUST GOVERNMENT (Joseph S. Nye, Jr. et al. eds., 1997).

<sup>22</sup> See TOM R. TYLER, WHY PEOPLE OBEY THE LAW (1990).

<sup>23</sup> "While the procedural justice literature provides a number of studies supporting the procedural justice hypothesis [claiming a link between procedural justice and legitimacy], those studies have almost all been conducted using local-level authorities with whom those interviewed have personal experience." Tom R. Tyler, *Governing Amid Diversity: The Effect of Fair Decisionmaking Procedures on the Legitimacy of Government*, 28 L. & SOC. REV. 809, 811 (1994).

<sup>24</sup> For discussions of the sources of legitimacy of national governmental bodies, see, e.g., Vanessa A. Baird, *Building Institutional Legitimacy: The Role of Procedural Justice*, 54 POL. RES. Q. 333 (2001); Jeffrey J. Mondak, *Institutional Legitimacy and Procedural Justice: Reexamining the Question of Causality*, 27 L. & SOC. REV. 599 (1993); Tyler, *supra* note 23; and Ulbig, *supra* note 21.

<sup>25</sup> See, e.g., Joseph S. Nye, Jr., & Philip D. Zelikow, *Conclusion: Reflections, Conjectures, and Puzzles* in WHY PEOPLE DON'T TRUST GOVERNMENT, *supra* note 21, at 253, 275-76 (discussing the secular decline in trust in government and tentatively concluding that the decline was precipitated by Vietnam and Watergate and has continued because of changes in sociocultural attitudes towards authority, the information revolution and globalization, increasing distance between political parties and the public, and a more negative media view of government); Jack

determines agencies' sociological legitimacy, for one or another group, is an empirical question, one that only survey work and good econometrics will really help resolve. Legal scholars have tended not to do this sort of work, and *Reformation* certainly didn't do it. This is not a criticism: just an observation to buttress my moralized reading of the article.

Stewart, in analyzing how agency discretion defeats the traditional model of agency legitimacy, does assert that "[c]riticism of agency policies is widespread and vociferous."<sup>26</sup> But the citations supporting this assertion are generally to law review articles and judicial opinions.<sup>27</sup> So at most *Reformation* shows that agencies lack sociological legitimacy among a particular elite group: legal intellectuals.<sup>28</sup> To read *Reformation* as addressing that sociological-legitimacy gap would be uncharitable indeed. It would be to read Stewart as saying: "Legal intellectuals are worried about agencies for reasons familiar to us (as legal intellectuals). What can we do to allay the worry, to solve the problem of sociological legitimacy among this pointy-headed group?" Obviously this is not what *Reformation* is about. Rather, the intellectuals' worries are (as I read the article) adduced by Stewart as evidence of a genuine, moral worry about agencies. The scholars and judges that Stewart cites to demonstrate a crisis of administrative governance are just canaries in the moral coal mine.

In short, the problem that *Reformation* tackles is one of moral, not sociological or legal, legitimacy. Agencies exercising broad delegations lack, or may lack, moral legitimacy, and we need a model or models of administrative law to resolve this moral problem. Now, it is tempting to deflate Stewart's project by rejecting the very concept of legitimacy, or by accepting the concept but rejecting his premise that administrative as opposed to legislative governance has a special legitimacy problem. Consider Stewart's statement of the traditional model, where he accepts (or at least does not challenge) its linkage between legitimacy and consent and its identification of the legislature as a repository of consent.

The doctrine against delegation appears ultimately to be bottomed on contractarian political theory running back to Hobbes and Locke, under which consent is the only legitimate basis for the exercise of the coercive power of government. Since the process of consent is institutionalized in the legislature, that body must authorize any new

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Citrin & Donald Philip Green, *Presidential Leadership and the Resurgence of Trust in Government*, 16 BRIT. J. POL. SCI. 431 (1986) (linking trust in government to the popularity of the incumbent President).

<sup>26</sup> *Reformation* at 1681.

<sup>27</sup> See *id.* at 1681-88.

<sup>28</sup> See also Reuel E. Schiller, *Enlarging the Administrative Polity: Administrative Law and the Changing Definition of Pluralism, 1945-70* 53 VAND. L. REV. 1389, 1410-16 (2000) (describing post-New Deal criticisms of agencies by academics and intellectuals).

official imposition of sanctions on private persons; such persons in turn enjoy a correlative right to repel official intrusions not so authorized.<sup>29</sup>

Utilitarians and other moral consequentialists will likely deny the special moral significance of consent. The notion that governmental bodies wrong a person by coercing her, and that this wrong will be dissolved if and only if the coerced party consents to the imposition, draws on traditionally deontological concerns: liberty, coercion, promise. And even non-consequentialists who accept the coercion/consent framework as a general moral matter might well rebel at the claim that legislative coercion (any more than administrative coercion) is generally<sup>30</sup> legitimated by the consent of those coerced. Within consent theory, the requisite consent for legitimacy is actual, not merely hypothetical consent.<sup>31</sup> Think of the point this way. Hypothetical consent might well serve to *justify* governmental choices. Rawls' *Theory of Justice* derives its principles of justice by imagining the choices of contractors behind a hypothetical veil of ignorance, and other modern contractualist moral philosophers such as Tim Scanlon have taken a similar line.<sup>32</sup> But, within modern contractualism, hypothetical consent functions as a general foundation for moral justification; legitimacy, as a distinct concern, disappears.<sup>33</sup> Conversely, the "consent theorists" for whom legitimacy remains something morally distinctive typically insist that governmental coercion is legitimated not by hypothetical agreement, but only by the actual undertaking of the person coerced -- an undertaking no less intentional, knowing and voluntary than a binding promise.<sup>34</sup>

Both legislative coercion *and* administrative coercion fall short of this standard of actual consent. Stewart's statement that "the process of consent is institutionalized in the legislature"<sup>35</sup> (whether taken as his own view or just the view that he ascribes to the traditional model of administrative law) is wishful thinking. Locke famously tried to demonstrate that subjects "tacitly consent" to legislative coercion, but this argument has been blown apart by critics.<sup>36</sup> The fact

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<sup>29</sup> *Reformation* at 1672.

<sup>30</sup> By "generally" legitimated, I mean legitimated with respect to all (not merely some) of the persons who are coerced by legislatures. While it is not unrealistic to suppose that some persons falling within the scope of coercive statutes have actually consented to their coercion, what is less plausible is that all such persons have.

<sup>31</sup> See A. John Simmons, *Justification and Legitimacy*, 109 *ETHICS* 739, 757-69 (1999); LESLIE GREEN, *THE AUTHORITY OF THE STATE* 161-62 (1988).

<sup>32</sup> See JOHN RAWLS, *A THEORY OF JUSTICE* (1971); T.M. SCANLON, *WHAT WE OWE TO EACH OTHER* (1998).

<sup>33</sup> See Simmons, *supra* note 31, at 759.

<sup>34</sup> See A. JOHN SIMMONS, *MORAL PRINCIPLES AND POLITICAL OBLIGATIONS* 75-79 (1979).

<sup>35</sup> *Reformation* at 1672.

<sup>36</sup> See, e.g., RONALD DWORKIN, *LAW'S EMPIRE* 192-93 (1986); GREEN, *supra* note 31, at 161-73;



that a subject participates in elections for the legislature, or resides within its jurisdiction rather than emigrating, hardly implies that she intentionally and knowingly authorizes the legislature to coerce her and promises to obey whatever coercive orders the legislature may issue. Voting and residing don't even evidence hypothetical agreement to the legislature's decisions, let alone actual consent, and an explicit *ex ante* announcement by the legislature that voting or residing will be taken as actual consent to legislative coercion wouldn't create legitimacy, since a choice that is secured by the threat of relinquishing rights (to vote) or vital interests (the range of vital interests jeopardized by emigration) isn't sufficiently voluntary to be genuine consent. To quote A. John Simmons, a leading modern consent theorist:

Legitimacy . . . is the exclusive moral right of an institution to impose on some group of persons binding duties, to be obeyed by those persons, and to enforce those duties coercively. Legitimacy is thus the logical correlate of the . . . individual obligation to comply with the lawfully imposed duties that flow from the legitimate institution's processes. The proper grounds for claims of legitimacy concern the transactional components of the specific relationship between individual and institution. Because I subscribe to political voluntarism as the correct account of these transactional grounds for legitimacy, and because I believe no actual states satisfy the requirements of this voluntarism, I also believe that no existing states are legitimate (*simpliciter*). States become more legitimate as they more closely approach the ideal of voluntary association, but no existing states are legitimate with respect to even a majority of their subjects.<sup>37</sup>

In short: if "legitimacy" means the moral license to coerce that flows from an intentional, knowing and voluntary undertaking by the person coerced, then (1) legitimacy in this sense is hard to assimilate to consequentialism, since consequentialists will deny that consent has an intrinsic role in changing the moral status of coercion, and (2) even non-consequentialist administrative law scholars should recognize that legitimacy thus construed is a hopelessly demanding standard that neither modern legislatures, nor modern agencies, can ever hope to approach.<sup>38</sup> But what if legitimacy is seen differently: as a special status that is linked, not to agreement, promise, or consent, but rather to *democratic participation*? Various modern political theorists, explicitly or implicitly, have redefined legitimacy along these lines. For example, Allen Buchanan argues "against the thesis that consent is necessary or sufficient for political legitimacy," and suggests instead that "where democratic authorization of the exercise of

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SIMMONS, *supra* note 34, at 75-100; Allen Buchanan, *Political Legitimacy and Democracy*, 112 ETHICS 689, 700-02 (2002); David Copp, *The Idea of a Legitimate State*, 28 PHIL. & PUB. AFF. 3, 10-16 (1999).

<sup>37</sup> Simmons, *supra* note 31, at 769-70.

<sup>38</sup> More precisely, what seems hopelessly demanding is the requirement that legislatures obtain the consent of all (or even most) of those that they coerce. See *supra* note 30.

political power is possible, only a democratic government can be legitimate.”<sup>39</sup> Any number of modern theorists argue that democracy has intrinsic moral significance, in some way.<sup>40</sup> This includes (but is not limited to<sup>41</sup>) theorists within the now popular school of “deliberative democracy.” These democratic theorists not infrequently use the word “legitimate” to characterize governmental decisions that satisfy their favored criterion of democracy.<sup>42</sup>

I have elsewhere argued that democratic participation (deliberative or not) lacks intrinsic moral significance.<sup>43</sup> But this is *not* the line of argument I will pursue here. Although I remain an instrumentalist about democracy, my strategy in this essay will be to assume intrinsicism plus a democratic conception of legitimacy and show that, even so, Stewart’s skepticism about administrative governance is misguided. Note the following, attractive features of the democratic conception of legitimacy, by contrast with the consent-based conception. First, both consequentialists and non-consequentialists might readily recognize that democracy has intrinsic moral significance. The easiest path to this conclusion, for the former, is to argue that democratic participation constitutes an intrinsic welfare benefit; while, for the latter, it is to argue that it is unfair or unjust to deprive persons of participation rights. Second, a “Goldilocks” solution doesn’t seem impossible here: we want a criterion of democracy that is attainable and yet not so minimal as to lack moral import. Full-blown deliberative democracy doesn’t fit the bill (it seems unattainable), but democracy meaning the selection of officials through elections that are “free and fair” in the ordinary sense (one-person/one vote, majoritarian voting rules, open public debate, non-gerrymandered districts, etc.) is both attainable and, still, might plausibly be thought to have intrinsic importance. This was, for example, Bickel’s view – and after him, John Hart Ely’s. It seems to be Jeremy Waldron’s.<sup>44</sup>

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<sup>39</sup> Buchanan, *supra* note 36, at 689, 703.

<sup>40</sup> See, e.g., AMY GUTMANN & DENNIS THOMPSON, *DEMOCRACY AND DISAGREEMENT* (1996); *DELIBERATIVE DEMOCRACY: ESSAYS ON REASON AND POLITICS* (James Bohman & William Rehg eds., 1997); JEREMY WALDRON, *LAW AND DISAGREEMENT* (1999); Buchanan, *supra* note 36, at 710-13. For an intrinsicist defense of democracy in the administrative context, see HENRY S. RICHARDSON, *DEMOCRATIC AUTONOMY: PUBLIC REASONING ABOUT THE ENDS OF POLICY* (2002).

<sup>41</sup> See Paul J. Weithman, *Contractualist Liberalism and Deliberative Democracy*, 24 *PHIL. & PUB. AFF.* 314 (1995).

<sup>42</sup> See, e.g., Buchanan, *supra* note 36, at 718-19; Joshua Cohen, *Deliberation and Democratic Legitimacy*, in *DELIBERATIVE DEMOCRACY*, *supra* note 40, at 73; RICHARDSON, *supra* note 40, at 23; WALDRON, *supra* note 40, at 53.

<sup>43</sup> See Matthew D. Adler, *Beyond Efficiency and Procedure: A Welfarist Theory of Regulation*, 28 *FLA. ST. U. L. REV.* 267-88 (2000). For another defense of instrumentalism about democracy, see Richard J. Arneson, *Democratic Rights at National and Workplace Levels*, in *THE IDEA OF DEMOCRACY* 118 (David Copp et al. eds., 1993).

<sup>44</sup> See BICKEL, *supra* note 2; JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980); WALDRON, *supra* note 40.

So here's the state of play. Democratic legitimacy, I'll assume, *is* a genuine moral property that elected legislatures, and their outputs, will possess under realistically attainable conditions, but that unelected administrative bodies operating under broad delegations will lack (without more). On this assumption, the moral legitimacy problem that *Reformation* addresses is a real problem – and further, a real problem of *administrative* governance, a moral deficit that characterizes *agencies* rather than governmental bodies generally (legislatures and agencies alike). Now, I want to argue that the problem is necessarily soluble, in the following sense. Consider any choice situation  $\{C_i\}$  faced by some actor P (a natural or artificial person), involved with administrative governance, at some particular point in time.  $\{C_i\}$  are the choices that are “available” (in some sense) to P at that time.<sup>45</sup> P might be an agency official, and the choices in  $\{C_i\}$  might be different rules plus the choice of non-issuance. Or, P might be the legislature, and the choices in  $\{C_i\}$  might be different versions of an organic statute, creating different powers, procedures, and institutional structures for a new agency, plus the choice of not establishing the agency. Or, P might be the President, and the choices in  $\{C_i\}$  might be different executive orders to an existing agency. Whoever P is, and whatever the options in  $\{C_i\}$ , the fact that some or all of these options are morally, democratically illegitimate *doesn't* leave P at sea, morally. There will always be some option in  $\{C_i\}$  that P is all-things-considered morally justified in taking. That just follows from the logic of moral justification. For every  $\{C_i\}$ , for every P, there exists at least one  $C^*$  that P is morally justified in performing.

The nitpicker might object, here, that there can be absolute ties in justification.  $C^*$ ,  $C^{**}$ , and  $C^{***}$  might all be morally required, relative to the other options in the set, but none of the three might be morally better than the others. Fine: by “justified,” I mean “required or permitted,” and not (more stringently) “required.” For every P, for every  $\{C_i\}$ , there is at least one option  $C^*$  that P is morally permitted (and maybe morally required) to perform, *even if*  $C^*$  is democratically illegitimate. In short, *legitimacy* may be a problem for administrative governance, but the problem is always soluble in terms of justification – in terms of what the actor ought to do.

What premises have I smuggled into my argument? Not many. I do assume *comparativism* about justification: namely, that the justified choice in any choice situation is determined by a comparison of the available choices with respect to relevant moral criteria, so that there will always be at least one option

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<sup>45</sup> What it means for choices to be “available” is an important question in moral theory and, more generally, decision theory. Does  $\{C_i\}$  consist of all the choices that are physically possible for P, or all the choices that he can think of, or all the choices that he does think of, or something else? My analysis brackets this issue and simply assumes that moral justification is relative to “available” choices, however best defined.

that the actor is permitted or required to take.<sup>46</sup> Comparativists about justification deny that there can be genuine moral dilemmas. Certain moral considerations might support one option; others might support another. But, at the end of the day, at least one choice will be morally required or at least permissible. It *can't* be the case that every option available to the actor is morally unjustified (a genuine moral dilemma). *Non-comparativism* about justification implies the possibility of genuine moral dilemmas. There is a substantial literature on these issues,<sup>47</sup> one to which I can hardly contribute and which I won't try to summarize – but it strikes me and, I hope, the reader that non-comparativism about justification is quite problematic. Morality is prescriptive. Moral statements guide choice and action; but non-comparativism dissolves any direct link between moral justification and decisional guidance, since (on this view) characterizing a choice as “unjustified” doesn't entail that some other available choice is recommended. Relatedly, non-comparativism is in deep tension with the truism that “ought implies can.”<sup>48</sup>

Given comparativism about justification, it follows that administrative agencies, legislators, Presidents, and other actors involved in administrative governance will always have some justified choice available to them. Comparativism, it should be stressed, is not the same as consequentialism. Consequentialists need not be comparativists – the “satisficing” approach, which instructs actors to choose actions with “good enough” consequences, represents a kind of non-comparativist consequentialism<sup>49</sup> – and, reciprocally, non-consequentialists don't have to believe in the possibility of genuine moral dilemmas. Non-consequentialists think that some moral norms have an “agent-relative” structure<sup>50</sup>; but agent-relative norms can be seen as ranking the choices available to the agent, and as necessarily leaving one which is (comparatively) permissible. Consider the agent-relative norm against killing the innocent. To maximize the distance from consequentialism, assume that this is an absolute agent-relative norm, never trumped by good consequences. The comparativist take on the norm is this. If the agent has some option other than killing an innocent person, then the killing would be unjustified, regardless of the good consequences that might flow from it. If, however, the agent is somehow in a

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<sup>46</sup> See Peter Vallentyne, *Moral Dilemmas and Comparative Conceptions of Morality*, 30 S. J. PHIL. 117 (1992) (discussing whether morality is comparative); Ruth Chang, *Comparison and the Justification of Choice*, 146 U. PA. L. REV. 1569 (1998) (discussing whether the justification of choice is comparative).

<sup>47</sup> See Vallentyne, *supra* note 46, at 117 nn.1-3 (citing literature).

<sup>48</sup> Non-comparativism allows for situations where every available choice is unjustified, i.e., the actor ought not perform any of the available actions, even though it is not the case that he “can” perform (has available to him) another choice.

<sup>49</sup> See Chang, *supra* note 46, at 1580-88.

<sup>50</sup> See Adler, *supra* note 43, at 314 nn. 188-89 (citing literature on agent-relative constraints).

position where whatever he does involves his killing of an innocent, then at least one such killing will be morally permitted or required, not prohibited.<sup>51</sup>

Note that my argument doesn't assume comparativism about legitimacy – just about justification. Philosophical discussion of legitimacy is often non-comparativist in tone,<sup>52</sup> and democratic legitimacy, in particular, might be a non-comparative moral feature. If legitimacy is a matter of meeting some standard that no option available to the decisionmaker will necessarily meet, then legitimacy will be non-comparative. For example, if legitimacy is (simplistically) a matter of (a) being elected, or (b) carrying out a determinate legal directive issued by an elected official, then in a rulemaking situation where an agency official can enact different rules or do nothing, and no choice is determined by statute or Presidential order, every choice by the official (including inaction) will be democratically illegitimate. *But* – and here's the rub – at least one choice will be justified.

Choices can be morally illegitimate but morally justified.<sup>53</sup> *Any time* we have distinct moral notions – fairness and welfare, goodness and rightness, justification and legitimacy – the two can conflict.<sup>54</sup> “Legitimacy,” on the democratic conception, refers to the electoral pedigree or some other democratic feature of governmental choice. But democracy is not the only moral concern, so it isn't surprising that justification and legitimacy can come apart. More subtly: even if democratic values are given lexical priority over other moral considerations in determining moral justification, actors involved with administrative governance will always have justified choices available to them. Parenthetically, I should say, it seems ridiculous to think that democratic values take lexical priority over others. Imagine a legislature, faced with the choice between establishing a democratically illegitimate agency that will help prevent a terrorist attack, ameliorate a natural disaster, regulate a dangerous toxin, or take other steps to save many lives, and the democratically impeccable choice of establishing no agency (with many resultant deaths).<sup>55</sup> If democracy takes lexical

<sup>51</sup> Of course, if agent-relative norms other than the no-killing norm were in the picture, the analysis would be more complicated.

<sup>52</sup> For example, Simmons, one of the leading modern theorists of moral legitimacy, offers (what I take to be) a noncomparative conception. See Simmons, *supra* note 31.

<sup>53</sup> Cf. Simmons, *supra* note 31, at 769-71.

<sup>54</sup> But what if Stewart intended “legitimate” as a synonym for “justified”? In that event, his skepticism about a solution to the problem of agency “legitimacy” turns out to be even more misguided than on the assumption that “legitimacy” and justification are distinct. In that event, comparativism about justification ensures *both* that actors involved with administrative governance will always have at least one justified choice *and* (by virtue of the synonymy of “legitimate” and justified) that they will always have at least one “legitimate” choice.

<sup>55</sup> A full analysis of legitimacy, democracy and moral justification would need to distinguish between democratic legitimacy in particular and democratic values more generally. Consider: two options might both be democratically illegitimate, in falling short of some democratic ideal,

priority, then the second legislative choice is justified, regardless of the number of lives at stake, but surely the justified choice might be the first. Indeed, in rejecting the proposal to cure the legitimacy gap created by the demise of the traditional model through the abolition of administrative agencies or the revival of the non-delegation doctrine,<sup>56</sup> Stewart himself implicitly rejects the view that it is always better to have more democratic but less effective governmental structures as compared to less democratic but more effective ones.

In any event, lexical priority for democracy doesn't vitiate my analysis. Assume both non-comparativism about democratic legitimacy and lexical priority. P might face a choice situation  $\{C_i\}$  where one choice,  $C_d$ , is democratically legitimate and the others aren't. In that case, P would be morally required to perform  $C_d$ . Alternatively (given non-comparativism about legitimacy), P might face a choice situation  $\{C_i\}$  where no choice is democratically legitimate. In that case, all the choices available to P are equally good *qua* democracy<sup>57</sup>; extra-democratic considerations (such as efficiency, saving lives, and so on), can come in as tie-breakers; and the justified choice for P will be the one that is justified in light of those extra-democratic considerations.

Finally, it should be stressed, moral uncertainty doesn't vitiate my analysis.<sup>58</sup> Consequentialists have a well-developed account of justified choice

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but one might be comparatively more democratic than the other. Or, two options might be democratically legitimate, but one might be worse for democratic values than the other. The case at hand, where the legislature is choosing between (1) establishing or (2) not establishing a democratically legitimate agency, is the latter sort of case: although the legislature's two *choices* are both democratically legitimate (at least in the sense of having the right electoral pedigree), the first choice will lead to further choices by another body (the agency) that will not be democratically legitimate, and in that sense the legislature's first choice is worse with respect to democratic values than the legislature's second choice. Still, it seems implausible that either democratic legitimacy, or democratic values more generally, take lexical priority over other moral considerations; and, further, as I argue below, even if they *do*, comparativism about justification ensures that the actor will always have a justified choice available.

<sup>56</sup> See *Reformation* at 1689-97.

<sup>57</sup> Strictly, we'd need to consider a range of cases: where only one option is democratically legitimate where multiple options are democratically legitimate, and these options are just as good with respect to democratic values; where multiple options are democratically legitimate, and one is better with respect to democratic values; where no option is democratically legitimate, and all the options are equally good with respect to democratic values; and where no option is democratically legitimate, and one is better with respect to democratic values. See *supra* note 55 (distinguishing between democratic legitimacy and democratic values). In all of these cases, either democratic legitimacy or democratic values will determine the actor's justified choice, or extra-democratic considerations will.

<sup>58</sup> Some theorists defend democratic procedures by reference to moral uncertainty. See WALDRON, *supra* note 40, at 252-54; Weithman, *supra* note 41, at 329-32.

under uncertainty, in the form of expected utility theory.<sup>59</sup> Non-consequentialists have done less work here.<sup>60</sup> But any comparativist about justification, regardless of her substantive moral theory, will say that the actor always has some justified option available to her. By contrast with the case of choice under full information, the morally justified option for an imperfectly informed actor will depend not merely on the actor's choice set, on moral principles, and on natural facts, but also on the actor's information base. Still, the prospect of genuine moral dilemmas is no more appetizing for the scenario of choice under uncertainty (that is the human scenario, after all), then for the scenario of choice by fully informed demigods.

So administrative agencies, and those non-agency actors who make choices about administrative agencies, will always have some morally justified course of action that they can pursue, even if many or all of the available choices are illegitimate in falling short of some democratic ideal. Thus, as I said at the outset, Stewart's skepticism about the legitimacy of administrative governance is misguided. "Misguided," not "mistaken," which would be more harshly critical. I have not claimed that agency decisionmakers or others involved with administrative governance will necessarily have some democratically legitimate choice available. Perhaps they won't. Nor have I have denied, at least in this essay, that democratic legitimacy has moral significance. Perhaps we should take steps to make agency processes more democratic, even at the expense of other values. Finally, and relatedly, I do not suggest that ideal models of governance – in particular, ideals of democratic governance – have no role whatsoever in moral deliberation. These ideals can, or might, help us in determining the comparative moral merits (democratic or other) of the choices we actually face.

Still, it is the comparative moral goodness of those choices, not their democratic legitimacy, that has direct, practical relevance. Here's another way to put the point. The demise of the traditional model creates two problems for administrative governance: first, that administrative agencies fall short of an ideal of democratic legitimacy; and second, that we must consider whether the moral considerations that have force for us, both democratic concerns and other concerns, would justify some reworking (perhaps moderate, perhaps radical) of agency structures and procedures. The first problem is not necessarily soluble – given non-comparativism about legitimacy, it need not be – but the second problem *is* necessarily soluble. Further, and in a deep sense, it is the second problem, not the first, that should engage our attention as moral agents and as moral advisers. The overriding moral concern of agency decisionmakers, of the political principals who decide how to structure and control agencies, and of those

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<sup>59</sup> For a good introduction to expected utility theory, see MICHAEL D. RESNIK, CHOICES: AN INTRODUCTION TO DECISION THEORY 81-120 (1987).

<sup>60</sup> See TED LOCKHART, MORAL UNCERTAINTY AND ITS CONSEQUENCES (2000).

expert bystanders who make recommendations to these decisionmakers (for example, law professors) should be what the decisionmakers ought to do – what they would be all-things-considered justified in doing, legitimate or not.

Stewart's article has a pessimistic, at times despairing tone. And administrative law scholarship, since, has oscillated between the optimists, who propose some new mechanism that will render agencies appropriately democratic – civic-republican deliberation, regulatory negotiation, Presidential oversight – and the pessimists who doubt that these devices will suffice to legitimate agency choice.<sup>61</sup> In one sense, the pessimism is appropriate, since it may be impossible to produce democratically legitimate agency structures at acceptable cost. In a deeper sense, though, the pessimism is misplaced. Morality is *practical*, about choice and action, and the “first-best,” non-comparative perspective that sees all of our choices as deficient relative to some ideal baseline (democratic or other) must ultimately give way, in moral reasoning, to a “second-best,” comparative perspective that focuses on which of the imperfect choices is least bad. Doom and gloom should, I suggest, be banished from public law scholarship, to be replaced not by the optimism that proposes better administrative mousetraps without fully reckoning their costs and limits, but by a tough-minded realism that eschews talk of dilemmas, tragic choices, or insoluble problems and, in particular, thinks seriously about just how much we care about democracy, and just how much we're willing to pay for it.

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<sup>61</sup> See, e.g., sources cited *supra* notes 8-10; Cary Coglianese, *Assessing Consensus: The Promise and Performance of Negotiated Rulemaking*, 46 DUKE L.J. 1255 (1997); Michael A. Fitts, *The Paradox of Power in the Modern State: Why a Unitary, Centralized, Presidency May Not Exhibit Effective or Legitimate Leadership*, 144 U. PA. L. REV. 827 (1996); Note, *Civic Republican Administrative Theory: Bureaucrats as Deliberative Democrats*, 107 HARV. L. REV. 1401 (1994).